NO. 71-1187

Supreme Court of the United States

October Term, 1971

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

MICHELE MARCHESE,

Petitioner,

vs.

ANGUS D. McEACHEN, Chief United States Probation Officer and Officer of United States Board of Parole, JOSEPH N. SHORE, Chairman of United States Board of Parole, and ATTORNEY GENERAL of UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

	Page
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	2
Questions Presented for Review	3
Statutes Involved	3
Statement of the Case	7
Statement of Facts	8
Reasons for Granting the Writ	10
Argument	12
I Since petitioner was convicted of violation of narcotic laws, and thereby precluded from having a suspended sentence, probation or parole, the United States Board of Parole did not have any jurisdiction over him following his mandatory release from prison because of good time and industrial good time credits under Sections 4162 and 4163 of Title 18, U.S.C.	12
II Since petitioner was sentenced to ten years, and since at the time of his mandatory release more than ten years had expired since he actually commenced serving his sentence, he was entitled to be delcared free from parole or from the jurisdiction of the parole board, due to the lapse of time	17
Conclusion	25

TABLE OF AUTHORITIES CITED

Cases	Page
Anderson v. United States, 405 F.2d 492	24
Anderson v. Williams, 279 F.2d 822	20, 24
Arketa v. Wilson, 373 F.2d 582 (9th Cir.)	13
Birch v. Anderson, 358 F.2d 520	20, 24
Brown v. United States, 392 F.2d 189	21
Carlton v. Landon, 342 U.S. 524	21
Chieppa v. Krimsky, 169 F.Supp. 337	15
Field v. United States, 193 F.2d 86	21
Fuller v. Weakley, 349 F.2d 90	16
Green v. United States, 356 U.S. 165	23
Jenkins v. United States, 389 F.2d 765	24
Leyvas v. United States, 371 F.2d 714	23, 24
Morgan v. Ward, 248 Fed. 691	24
Munich v. United States, 337 F.2d 356	1
Powell v. Parole Board, 349 F.2d 715	1
Riese v. United States, 76 U.S. 13	2
Robinson v. Willingham, 369 F.2d 688	1
Russell v. United States, 306 F.2d 402 (9th Cir.)	2
Shelton v. Board of Parole, 388 F.2d 567	20, 2

TABLE OF AUTHORITIES CITED

Cases (cont'd)	Page
Story v. Rives, 97 F 2d 182	15
Taylor v. Taintor, 83 U.S. 366	22
United States ex rel. Brown v. Fogel, 395 F.2d 291	23
United States v. D'Argento, 227 F Supp. 596	21, 22
United States v. Caliglieri, 35 Fed. 799	22
United States v. Eagan, 394 F.2d 262	21, 23
United States v. Figueroa, 325 F.2d 418	15
United States v. Gross, 159 F Supp. 316 (D.C. Nevada)	16, 17
United States v. Lamb, 150 F Supp. 310	17
United States v. Lee, 170 Fed. 613	21
United States v. Mitchel, 246 F Supp. 750	21
United States v. Schneiderman, 102 F Supp. 52	22, 23
Weber v. Willingham, 356 F 2d 933	16
Yates v. United States, 398 F.2d 737	13

Statutes

United States Codes, Title 18	
Sec. 3142	22
Sec. 3143	21, 22
Sec. 3150	23
Sec. 3151	23

TABLE OF AUTHORITIES CITED

Statutes	Page
United States Codes, Title 18 (cont'd)	
Sec. 3568	7, 20, 24
Sec. 4161	5, 12, 14
Sec. 4162	3, 5, 12, 14
Sec. 4163	3, 7, 12, 14
Sec. 4164	7, 10, 11, 14, 15, 16, 17, 18, 19
Sec. 4202	12, 15, 16
Sec. 4203	15
Sec. 4205	6, 16, 20
Sec. 4207	6, 12
United States Codes, Title 21	
Sec. 174	3, 4, 8, 12
United States Codes, Title 26	
Sec. 7237(c)	8
Sec. 7237(d)	4, 12, 13, 15, 16
United States Codes, Title 28	
Sec. 1361	2
Sec. 1254(1)	2

NO

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

COMES NOW Michele Marchese and respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse its judgment affirming the judgment of the United States District Court,. Central District of California, dismissing the action of petitioner against the respondents; and with respect thereto, petitioner sets forth the following:

OPINIONS BELOW

On November 25, 1969, the United States District Court, Central District of California, made a written order and opinion dismissing petitioner's amended complaint and action. On November 29, 1971, the United States Court of Appeals for the Ninth Circuit affirmed the judgment of dismissal. Its opinion has not yet been officially reported, and a copy thereof is attached hereto as Appendix "A."

A petition for rehearing was timely filed, and said Court of Appeals denied the said petition on December 29, 1971.

JURISDICTION

The jurisdiction of this Court is invoked because the case was filed in the United States District Court, Central District of California, against the United States and federal agencies under the provisions of Sections 1361 and 1391(e) of Title 28, U.S.C. Jurisdiction is conferred on this Court by Section 1254(1) of Title 28, U.S.C., to review the judg-

ment in question.

QUESTIONS PRESENTED FOR REVIEW

1. Since Marchese was convicted of violation of narcotics law, Section 174 of Title 21, U.S.C., and therefore precluded from having a suspended sentence, probation or parole, the United States Board of Parole did not have any jurisdiction over him following his mandatory release from prison because of good time and industrial good time credits under Sections 4162 and 4163 of Title 18, U.S.C.

2. Since Marchese was sentenced to ten years, and since at the time of his mandatory release more than ten years had expired since he actually commenced serving his sentence, he was entitled to be declared free from parole or from the jurisdiction of the Parole Board, due to the lapse of time.

3. Since, upon Marchese's mandatory release on July 18, 1969, the Bureau of Prisons fixed the date when he was no longer to "be deemed on parole" as of October ...., 1972, if his parole is revoked prior to that date, he should not be required to serve time in prison beyond that date.

STATUTES INVOLVED

Title 21, United States Code, Section 174

Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the

transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years . . . .

. . . .

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. . . . .

Title 26, United States Code, Section 7237(d)

(d) **No suspension of sentence; no probation; etc.**— Upon conviction—

(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C.Code 24-201 and following), as amended, shall not apply.

GOOD TIME ALLOWANCE
Title 18, United States Code

§ 4161. Computation generally

Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subject to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, . . .

. . . .

Ten days for each month, if the sentence is ten years or more.

§ 4162. Industrial good time.

A prisoner may, in the discretion of the Attorney General, be allowed a deduction from his sentence of not to exceed three days for each month of actual employment in an industry or camp for the first year or any part thereof, and not to exceed five days for each month of any succeeding year or part thereof.

In the discretion of the Attorney General such allowance may also be made to a prisoner performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.

Such allowance shall be in addition to commutation of time for good conduct, and without regard to length of sentence. June 25, 1948, c. 645, 62 Stat. 853.

Title 18, United States Code, Section 4205.

Retaking parole violator under warrant; time to serve undiminished.

A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve.

Title 18, United States Code, Section 4207.

Revocation upon retaking parolee.

A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.

The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.

If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced. June 25, 1948, c. 645, 62 Stat. 855.

Title 18, United States Code, Section 4163

Discharge.

Except as hereinafter provided a prisoner shall be released at the expiration of his term of sentence less the time deducted for good conduct. A certificate of such deduction shall be entered on the commitment by the warden or keeper

Title 18, United States Code, Section 4164

Released prisoner as parolee.

A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days.

Title 18, United States Code, Section 3568.

Effective date of sentence; credit for time in custody prior to the imposition of sentence.

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. . . . .

STATEMENT OF THE CASE

Petitioner Marchese was mandatorily released from prison on July 18, 1969, after serving all but

1,357 days of a ten-year sentence which he commenced to serve on July 10, 1959. The United States Board of Parole contended that he was still "deemed on parole" for the said 1,357-day period and required him to report and be bound by the restrictions and conditions placed upon him for said period. On August 11, 1969, petitioner filed a verified amended complaint against respondents in the United States District Court, Central District of California, for injunction and declaratory relief, seeking a decree that he was free from parole. (Clerk's Transcript [referred to hereinafter by the initials C.T.] 14-20.) On October 9, 1969, the respondents filed a motion to dismiss (C.T. 29-30). Petitioner Marchese filed a verified opposition to the motion, setting forth additional facts in support of his complaint (C.T. 34-39).

The motion to dismiss was granted on November 25, 1969 (C.T. 52-56). The judgment of dismissal was affirmed by the United States Court of Appeals for the Ninth Circuit on November 29, 1971 (Opinion - Appendix "A"). Timely petition for rehearing was denied on December 29, 1971.

There was no pleading filed by respondents. The facts as hereinafter set forth are those derived from the verified amended complaint and the verified opposition by petitioner to respondents' motion to dismiss.

STATEMENT OF FACTS

Petitioner Marchese was convicted in June of 1958 for violation of narcotic laws under Section 174 of Title 21, U.S.C., and Section 7237(c) of Title 26, U.S.C. He

was sentenced on July 16, 1958 to ten years on each count, the counts to run concurrently. After all remedies on appeal had been unsuccessfully exhausted, he commenced the actual service of his sentence in federal prison on July 10, 1959. On June 20, 1961, he filed a petition for habeas corpus, which was denied, and the order of denial was affirmed by the United States Court of Appeals for the Ninth Circuit. On June 10, 1963, the Supreme Court granted his petition for certiorari (374 U.S. 101), rendering its decision as follows:

> "*Per curiam*. The petition for writ of certiorari is granted, the judgment vacated and the case remanded to the United States District Court for the Southern District of California for reconsideration in the light of *Sanders v. United States*, 371 U.S. 1."

After several sessions of hearing in the District Court, Judge Thurmond Clark, on September 30, 1963, granted Marchese's petition, reduced his sentence to five years, and discharged him from custody, since he had already served about 4 years and 4 months of his sentence, with an excellent prison record. The Assistant United States Attorney stated that the Government was going to appeal from the order of discharge, and insisted upon a sizeable bond. Bond was therefore fixed at $10,000.00, containing restrictive conditions. The Court of Appeals reversed the order of discharge and remanded Marchese. After his remedies had been unsuccessfully exhausted, he resumed serving his sentence on November 29, 1967, after about 4 years at large on bond. During his freedom, Marchese conducted himself as a good and law-abiding

citizen, living with his wife and children in Glendale, California, and obeying all laws.

Because of his excellent prison record and meritorious service in prison, petitioner was mandatorily discharged on July 18, 1969, having been credited with 1,200 days of good conduct time and 157 days of meritorious good time, with aggregated credits of 1,357 days. We have set forth in Appendix "B" hereto the actual time spent in custody and the period of freedom under the discharge order.

At the time of petitioner's release, conditions were imposed that he be "deemed on parole" and under the jurisdiction of the United States Board of Parole and subject to its restrictions and orders until October of 1972. At the time of his release, ten years and eight days had expired since he commenced actual service of his sentence on July 10, 1959. If he had served continuously, because of the 180-day provision of Section 4164 of Title 18, U.S.C., the term of his sentence would have expired on January 10, 1969, more than six months before the date of his release.

REASONS FOR GRANTING THE WRIT

1. This Court has never passed upon the issue of whether a prisoner convicted under the United States narcotic laws—who is denied the privilege or right to a suspended sentence, probation and parole—is still, nevertheless, on parole and subject to the jurisdiction and conditions imposed by parole after he is mandatorily released. It is important that this question be passed upon and

settled.

2. The case of petitioner herein is unique and apparently one of first impression, since it has never, so far as counsel has been able to ascertain, been passed upon by either this Court or the Courts of Appeals. The issue herein referred to is whether, when a prisoner is mandatorily released after the expiration of the term of his sentence, he is still deemed under the jurisdiction of the Parole Board under Section 4164 of Title 18, U.S.C., for a period equal to the amount of good credit time. In the usual case there is no such issue, since there has been a continuous service of sentence prior to release, whereas in petitioner's case, the service of his sentence was interrupted while he was at liberty under a habeas corpus discharge. This is an important issue to be determined if similar cases should arise, or in cases where a new trial may be granted during the service of a sentence and the prisoner freed pending the second trial and final determination of any judgment thereon

3. Upon petitioner's mandatory release, the Bureau of Prisons fixed a date in October of 1972 for the termination of his parole period. It is important to have the question resolved, that if his parole is revoked prior to that date, must he be confined in prison only to the said date or can he be held in custody for a period equal to his good time credits, even though such period extends beyond the aforesaid date. This issue is important to be settled for attempted revocation of parole of prisoners mandatorily released who are not eligible for parole, as distinguished from prisoners granted parole by the Parole Board.

ARGUMENT

I

Since Petitioner Was Convicted Of Violation Of Narcotic Laws, And Thereby Precluded From Having A Suspended Sentence, Probation Or Parole, The United States Board Of Parole Did Not Have Any Jurisdiction Over Him Following His Mandatory Release From Prison Because Of Good Time And Industrial Good Time Credits Under Sections 4162 And 4163 Of Title 18, U.S.C.

Petitioner belongs to the class of prisoners denied a suspended sentence, probation and parole under the provisions of Section 7237(d) of Title 26 and Section 174 of Title 21, U.S.C. We contend that since he was definitely denied parole, upon his mandatory release under the provisions of Sections 4161 and 4163 of Title 18, U.S.C., he would not come under the jurisdiction of the Parole Board, because his release was not effected by an order of the Board.

Section 4202 of Title 18, U.S.C.,provides that the Board of Parole, in its discretion, may release the prisoner on parole and that "[e]ach *order of parole* shall fix the limits of parolee's resicence . . . " (emphasis added). Section 4207 of Title 18, U.S.C., provides in part that the Board may at any time in its discretion revoke the "*order of parole*" (emphasis added).

It is to be specially noted that under the parole statutes the Board of Parole makes the *order* upon which the parolee is released and that it is the *order* by the Board granting the release which specifies the terms and conditions

of the release. It has been frequently stated that parole is not a matter of right but of grace *granted by the Board at its discretion. Arketa v. Wilson,* 373 F.2d 582 (9th Cir.); *Yates v. United States,* 398 F.2d 737.

The above provisions with respect to the granting of parole by the Board were adopted in 1951, and narcotic law violators were then eligible for parole. However, in 1956, Congress, by amendatory acts as set forth in the aforesaid Section 7237(d) of Title 26, U.S.C., deprived narcotic law violators of any possibility of parole; and when a prisoner was sentenced thereafter for such violation, his sentence was founded upon the impossibility of parole and the parole provisions ceased to be applicable to him. It should follow as a corollary that the Board of Parole ceased to have the jurisdiction, power and discretion to make *any order* with respect to parole pertaining to narcotic law violators.

In the case of *Munich v. United States,* 337 F.2d 356, the court stated at page 361:

> " . . . one of the consequences of conviction of violation of 21 U.S.C. § 174, is that the imposition or execution of the sentence imposed shall not be suspended, probation shall not be granted and parole is not available."

Petitioner is in the class of prisoners to whom the parole laws are wholly inapplicable and over whom the Board of Parole, not having made an *order* granting parole and not being able to make such an *order* and thereby acquire jurisdiction, cannot be said to have acquired jurisdiction over him by any law specifically directed to or pertaining to such class of prisoners. An issue in this case

is that petitioner Marchese, who was not released by *order* of the Parole Board, is not subject to any of the Board's rules and regulations, and we respectfully contend that he is not so subject.

Under Section 4161 of Title 18, U.S.C., any prisoner convicted of an offense against the laws of the United States, and confined for a definite term other than life, is entitled to a deduction from the term of his sentence, from the time it commences to run, of a certain number of days of each month, depending on the length of the sentence, provided he has observed all the rules of the prison and has not been subjected to punishment. Petitioner had an excellent prison record and was entitled and was granted 1,200 days good time credit on his sentence. He was also granted, at the discretion of the Attorney General, an additional 157 days for industrial good time under Section 4162 of Title 18, U.S.C., and received his discharge by the prison warden therefor under Section 4163 of Title 18, U.S.C.

Section 4164 of Title 18, U.S.C., which involves the principal issue herein, as originally adopted in 1948, provided that upon release for good conduct the prisoner "shall . . . be treated as if released on parole and shall be subject to all of the provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms for which he was sentenced." In 1961, the section was amended to provide that, upon release, the prisoner "shall be *deemed* as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days."

It is to be noted that there is a clear separation of powers between the mandatory release by the warden and the granting of parole by order of the Parole Board, wherein the Board in its order fixes the terms and conditions of the release. The distinction was clearly recognized in the case of *Chieppa v. Krimsky*, 169 F.Supp. 337, wherein the court held that Section 4164 of Title 18, U.S.C., did not apply to prisoners released on parole under Sections 4202 and 4203 of Title 18, U.S.C. In that case, the prisoner was not of a class denied parole, so the court was not faced with the issue raised in the instant case.

We are not unmindful of the cases cited by the United States District Court for the Central District of California in its order dismissing petitioner's action.

In the cited case of *Story v. Rives*, 97 F.2d 182, and *Robinson v. Willingham*, 369 F.2d 688, the defendants were convicted of robbery, and the prohibition against parole was not involved. Hence, said cases are inapposite to the instant case.

In the case of *Powell v. Parole Board*, 349 F.2d [illegible], the court held that the language of Section 7237(d) of Title 26, U.S.C., was not applicable to the mandatory release provisions of Section 4164 of Title 18, U.S.C.

In *United States v. Figueroa*, 325 F.2d 418, the court based its decision primarily on the ground that Section 7237(d) referred specifically to Section 4202 of Title 18, U.S.C., prohibiting parole under said section, and that no mention was made concerning the mandatory release provisions. The court concluded that the provisions of Section 4164 with reference to parole after

mandatory release remained in effect. The court overlooked the fact that Section 7237(d) specifically denied the right of the Parole Board to assume jurisdiction. The denial of this jurisdiction is specific and takes precedence over general provisions of Section 4164 that all prisoners are "deemed" to be released on parole.

In *Weber v. Willingham*, 356 F.2d 933, the court made the same mistake, holding that Sections 4164 and 4205 of Title 18, U.S.C., are unaffected by the exclusionary provisions of Section 7237(d) of Title 26, U.S.C., that the two statutes are *sui generis*, and that the jurisdiction of the Parole Board is not dependent on its discretionary jurisdiction under Section 4202 of Title 18, U.S.C.

In *Fuller v. Weakley*, 349 F.2d 90, the court, without considering the rules respecting interpretation of conflicting or later adopted criminal statutes, held that to except narcotic violators from the provisions of Section 4164 of Title 18, U.S.C., would be an "incongruous interpretation."

We submit that Section 7237(d) of Title 26, U.S.C., denied narcotic law violators the possibility by their good conduct of becoming eligible for parole after serving one-third of their terms, but that they retained their right, as other prisoners, to earn a mandatory release by their good conduct, since this is not parole in fact and, hence, not prohibited by Section 7237(d).

Since the specific statute (Section 7237(d)) forbidding parole was adopted after the general parole statutes, the former controls. In *United States v. Gross*, 159 F.Supp. 316 (D.C. Nevada), the court stated the general rule as follows:

"Moreover, it is fundamental in criminal law

> that where two statutory provisions cover the same subject matter, but one is general, and may apply to similar, but unrelated situations, and the other is specific and limited to the situation in question, the specific alone will control."

Citing *United States v. Lamb*, 150 F.Supp. 310, 312.

We submit that the specific statute prohibiting parole, being adopted after Section 4164 of Title 18, U.S.C., providing that a prisoner mandatorily released be treated or "deemed" as on parole, prevails over the latter statute, and that petitioner Marchese, being denied the benefit of parole, is entitled, upon his mandatory release, to be free from the restrictions and possible hazards of parole and free from the jurisdiction, rules and regulations of the Board of Parole.[1]

– II

Since Petitioner Was Sentenced To Ten Years, And Since At The Time Of His Mandatory Release More Than Ten Years Had Expired Since He Actually Commenced Serving His Sentence, He Was Entitled To Be Declared Free From Parole Or From The Jurisdiction Of The Parole Board, Due To The Lapse Of Time.

Petitioner's case is unique, different and distinct from the cases relied upon by both the District Court and the

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1. Some months ago, the Parole Board revoked petitioner's parole and issued a parole revocation warrant. The warrant was not executed until February 11, 1972, when the United States Marshal went to petitioner's home to execute the warrant. Petitioner was not at home, but on Monday, February 14, 1972, he voluntarily went in and surrendered to the Marshal. At present he is in the custody of the Attorney General. We are informed that the Government contends that, because of the revocation of the parole ("deemed on parole"), petitioner must serve the 1,357 days of good and meritorious time previously allowed. Thus, the importance of a decision by this Honorable Court on the issues herein presented is accentuated and increased.

Court of Appeals. Those cases are inapposite because they dealt only with situations where there were no interruptions in the service of the sentences by the prisoners. They continued serving the term of their respective sentences without interruption until they were mandatorily released, so that in case of a ten-year sentence (similar to that of petitioner) there would still be approximately one-third of the ten years remaining from the date of commencement of service at the time of release. However, when petitioner Marchese was released on July 18, 1969, ten years and eight days had already expired. Further, if we take into consideration the 180-day period provided in Section 4164 of Title 18, U.S.C., the term would have expired on January 10, 1969, over six months prior to petitioner's release.

At the outset we wish to make clear that petitioner did not and does not now claim that the time he spent free on bond in the midst of his service of sentence should be considered as equivalent to actual custody in prison. The cases hold that the time required to be served by a defendant in actual custody behind prison walls cannot be served constructively by him outside the prison. Thus, regardless of the time that petitioner Marchese's sentence was interrupted when he was free on bond, we concede that the requirement of actual custody in prison for ten years less "good time credits" must be met. In petitioner's case this requirement was met by his service in prison of ten years less "good time" credits provided to all prisoners who may have earned the same by their good and meritorious conduct.

Our position is that when Marchese was free on bond the term of his sentence continued to run for all purposes except the requirement of actual confinement in prison.

While he was free on bond, he was in constructive custody. The language of Section 4164 of Title 18, U.S.C., supports our contention as to the running of time on his sentence other than that required actually to be served in prison. Section 4164 provides in part as follows:

> "A prisoner having served his term or terms less good time deductions shall upon release be deemed as if released on parole *until the maximum term or terms for which he was sentenced* less one hundred and eighty days." (Emphasis added.)

"Term" is defined by Webster in part as follows:

> "That time which limits the extent of anything; limit; bound; termination; end. . . . A limited or definite extent of time; the time for which anything lasts, as a term of five years. . . . A time or date, fixed, appointed or agreed upon."

"Expiration" is defined in part as:

> "A coming to a close; cessation, extinction; termination; end."

The term of imprisonment fixed by the court for petitioner was ten years. The term of his imprisonment commenced upon his commencement of the service of his sentence on July 10, 1959, and he would have been free of all custody on July 10, 1969, but for the general rule that constructive custody under the jurisdiction of the Attorney General outside the prison walls is not equivalent to actual prison custody or confinement. It has been expressed thus: "Imprisonment contemplated by sentence imposed by a Federal Court is confinement in fact and not merely in fiction." Thus, as we have indicated

above, we are not attacking as illegal the time spent by petitioner in prison beyond the ten-year period less 180 days; we attack only the imposing of conditions on him outside of actual confinement beyond the expiration of the ten-year period following the commencement of his service of sentence.

Section 3568 of Title 18, U.S.C., provides in part:

> "The sentence of imprisonment . . . . shall commence to run from the date on which such person is received at the penitentiary, reformatory or jail for service of such sentence. . . . "

It is to be noted that Section 4205 of Title 18, U.S.C., treats the expiration of the period running from the time of the *commencement of service* of sentence as precluding the issuance of a warrant retaking a prisoner on parole. The following cases hold that the warrant for retaking a prisoner after revocation of his parole must be issued prior to the expiration of the maximum term of his sentence less 180 days, computing such period from the date of the commencement of service of sentence. A warrant issued beyond said period was invalid: *Shelton v. Board of Parole*, 388 F.2d 567; *Birch v. Anderson*, 358 F.2d 520; *Anderson v. Williams*, 279 F.2d 822.

The same reasoning applies to petitioner; i.e., no warrant could be issued for the revocation of his parole by the Board after his mandatory release, because the maximum term of ten years had expired. This is not a situation where a sentence is deemed interrupted and tolled by the escape of a prisoner, for petitioner's status at no time was that of an escaped prisoner. He was free

on a judgment of the District Court discharging him under habeas corpus.

Furthermore, he was only free at that time upon a substantial bond of $10,000.00 insisted upon by the Government. His freedom on bond was in many respects so similar and analogous to freedom on parole that such period of freedom should be considered and computed in determining the expiration of the maximum term of his sentence. Let us, for this purpose, review what federal courts have to say about the nature, effects and consequences of bail.

In *Carlton v. Landon,* 342 U.S. 524, the Court stated at page 547:

> "When a prisoner is out on bail he is under court control, though the bounds of his confinement are enlarged. His bondsmen are his jailers. While the bailsmen may arrest without warrant, the court proceeds under bench warrant to retake a prisoner."

(*Cf.* 18 U.S.C. § 3143.)

When a defendant is admitted to bail, he is placed in the custody of his sureties, who have the power to arrest him any time they desire. *Field v. United States,* 193 F.2d 86; *United States v. Lee,* 170 Fed. 613.

The court at any time may restrict defendant's movements and confine his movements within a specified area or in the district where he resides. *United States v. Eagan,* 394 F.2d 262; *Brown v. United States,* 392 F.2d 189; *United States v. Mitchel,* 246 F.Supp. 750.

In *United States v. D'Argento,* 227 F.Supp. 596, the court stated at page 603:

> "The surety has his principal on a string since under 18 U S C A § 3142, a surety may, *at any time, arrest the principal* and deliver him into the custody of the United States Marshal and be fully discharged thereby."

See also similar statement in *United States v. Caliglieri*, 35 Fed. 799, 801, and in *Taylor v. Taintor*, 83 U.S. 366, 371.

Section 3142, Title 18, U.S.C., provides:

> "One released on execution of bond may in vacation be arrested by his surety and delivered to the Marshal; at the request of the surety, the judge or other officer may recommit party to the custody of the Marshal and endorse on recognizance the discharge and exoneretur of surety, and the person so committed shall be held in custody until discharged in due course by law."

Section 3143, Title 18, U.S.C., provides that the judge at any time, if bail be deemed insufficent, may require better security or, in default, order defendant to be committed.

In *United States v. Schneiderman*, 102 F.Supp. 52, Judge William C. Mathes of the United States District Court in Los Angeles stated at page 72:

> "We retain today the ancient theory of bail. As Mr. Justice Field pointed out in *Taylor v. Taintor* (1872) . . . 83 U.S. 366, 371, ... : 'When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot

> be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and if necessary, may break and enter his house for that purpose.' "

Citing *Riese v. United States*, 76 U.S. 13, 21-22.

Section 3150 of Title 18, U.S.C., makes the jumping of bail an offense punishable by fine up to $5,000 or 5 years in prison, or both. Thus, if petitioner Marchese had failed to appear at any hearing set by the court or noticed by the United States Attorney, he could have been accused of bail jumping and been subjected to punishment under said section. He could also have been subject to punishment for contempt in the event of the breach of any condition of the bond or of a court order pertaining to his freedom on bond. 18 U.S.C. § 3151; *Green v. United States*, 356 U.S. 165; *United States ex rel. Brown v. Fogel*, 395 F.2d 291.

The court at any time could have placed additional restrictions on petitioner Marchese, such as requiring him to report periodically to the United States Marshal or other government officer, as was done in *United States v. Eagan, supra*, 394 F.2d 262.

In its opinion in this case, the Court of Appeals stated:

> "There is neither precedent nor reason for treating time spent on bail as equivalent to parole time. We do not, for example, accord such treatment to time spent on bail pending appeal." (*Leyvas v. United States*, 371 F.2d 714.)

Leyvas is entirely inapposite, because the petitioner was out on bail *before* commencing service of his sentence

not *after* he had commenced actual serving of sentence. The court held that the sentence commenced to run only after the prisoner was received at the place of service and began serving his sentence. Accord: 18 U.S.C. § 3568; *Anderson v. United States*, 405 F.2d 492; *Russell v. United States*, 306 F.2d 402 (9th Cir.); *Jenkins v. United States*, 389 F.2d 765.

The Court of Appeals herein ignored the significance of the cases of *Shelton*, *Birch* and *Anderson*, cited above and in our closing brief before said court, for it made no mention of them in its opinion.

In the case of *Morgan v. Ward*, 248 Fed. 691, the petitioner's sentence was interrupted by freedom on habeas corpus for 543 days. In that case the petitioner had been discharged unconditionally and no recognizance required of him. He claimed that such period should be credited and treated as actual confinement, but the court stated that since he was not under recognizance, his contention must be rejected and that, furthermore, he could not serve his term *in prison* by absent treatment. The issue of parole was not therein involved.

We reiterate that we do not contend that the time spent by petitioner Marchese while free on bond was equivalent to time actually required to be spent in the confines of the prison, but only that it should be applied constructively to the time he was permitted to be outside of prison walls "deemed to be" on parole.

In the light of the above, we respectfully submit that the maximum term of petitioner Marchese's sentence had expired when he was mandatorily released, and there-

after he was not "deemed to be on parole" or under the jurisdiction and subject to the rules and regulations of the United States Board of Parole.

CONCLUSION

For the foregoing reasons, we respectfully request that this petition for certiorari be granted and that this Honorable Court decree that upon petitioner Marchese's mandatory release on July 18, 1969, more than ten years after he commenced serving his ten-year sentence, he was free from parole and should be released from custody.

Respectfully submitted,

RUSSELL E. PARSONS
and
BURTON MARKS

Attorneys for Petitioner

APPENDIX

	Page
Appendix "A" Opinion of the Court Below	1
Appendix "B" Time Spent in Custody	3

APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

No. 25,434.

MICHELE MARCHESE, Plaintiff-Appellant, vs. ANGUS D. McEACHEN, Chief United States Probation Officer, et al., Defendants-Appellees.

[November 29, 1971]

Appeal from the United States District Court for the Central District of California

Before: BROWNING and CHOY, Circuit Judges, and CRAIG,* District Judge

PER CURIAM:

Marchese appeals the dismissal of his action under the Civil Rights Act for injunction and declaratory relief. We affirm.

Marchese was convicted of a narcotics violation in 1958 and began serving a 10-year sentence on July 10, 1959. After serving four and one-half years, he was released on bail while rulings in his favor in a habeas corpus proceeding were appealed. He remained free on bail approximately three and one-half years, from October 1, 1963, to June 12, 1967. He was returned to prison on the latter date when his habeas victory was reversed, and remained in prison until his mandatory release date, July 18, 1969, calculated

*Honorable Walter E. Craig, United States District Judge, District of Arizona, sitting by designation.

on the basis of a ten year prison term less 1200 days' good behavior time accrued.

"Good time" discharges are governed by 18 U.S.C. §§ 4161-4164. Section 4164 provides:

> "A prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days."

Marchese was released "as if released on parole," and it is apparently contemplated that he will remain subject to the conditions of parole for 1200 days less the statutory exclusion of 180 days. He contends that he was entitled to unconditional release.

1. Marchese argues that since narcotics offenders are prohibited from obtaining parole, probation, or a suspended sentence (26 U.S.C. § 7237(d)), he cannot be subjected to "quasi parole" under section 4164 when released early due to good behavior. Every court to consider the question has held that section 7237 does not operate to exempt narcotics offenders from section 4164 supervision. *Weber v. Willingham*, 356 F.2d 933, 934 (10th Cir. 1966); *Powell v. D. C. Board of Parole*, 349 F.2d 715, 716 (D.C. Cir. 1965); *Fuller v. Weakley*, 349 F.2d 90, 93 (4th Cir. 1965); *United States v. Figueroa*, 325 F.2d 418, 419 (2d Cir. 1963). We agree.

2. Marchese argues that the three and one-half years he was out on bail between 1963 and 1967 should be credited toward any period of supervision the authorities now seek to impose. However, section 4164 clearly calls for a period of "quasi-parole" *after* completion of a prison

sentence with good behavior. Such post-incarceration supervision serves an obvious rehabilitative purpose. There is neither precedent nor reason for treating time spent on bail as equivalent to parole time. We do not, for example, accord such treatment to time spent on bail pending appeal. *Cf. Leyvas v. United States*, 371 F.2d 714 (9th Cir. 1967).

Affirmed.

■■■■■■■■

APPENDIX "B"

TIME SPENT IN CUSTODY

The time spent by Michele Marchese in custody and the time spent at large on bond, including time following his discharge under Section 2255 of Title 28, U.S.C., and habeas corpus,are as follows (C.T. 36-37):

(a) Date of arrest 3/13/58 - released on bail 4/7/58. Amount of time, formerly considered as dead time, 25 days;

(b) April 16, 1959, surrendered to U. S. Marshal following affirmance of judgment of conviction by Court of Appeals; June 1, 1959, released on appeal bond. Time in custody: 45 days;

(c) July 10, 1959, surrendered to U. S. Marshal and commenced serving sentence;

(d) October 1, 1963, released on $10,000.00 bond following reduction of sentence and order of discharge rendered by Judge Clarke on September 30, 1963.

This bond was demanded and required by

the United States Attorney because of his intention to appeal the order;

(e) June 12, 1967, surrendered to the U. S. Marshal following order of Court of Appeals remanding Marchese to custody after its reversal of Judge Clarke's order. Time free on bail with liberty restricted: 3 years, nine months and twelve days;

(f) August 8, 1967, released on bail ordered by Justice Douglas on July 25, 1967. Time spent in custody from June 12th to August 8th, 1967: 57 days;

(g) November 29, 1967, surrendered to U. S. Marshal following denial of certiorari by the United States Supreme Court. Time spent on bond under Justice Douglas' order 113 days;

(h) Marchese remained in prison from November 29, 1967 to July 18, 1969, at which time he was granted a mandatory release;

(i) Credits for time allowed requiring mandatory release were: 1,200 days for good conduct time under Section 4161 of Title 18, U.S.C., and 157 days allowed for meritorious good time, aggregating release time credits to 1,357 days.

■■■■■■■■

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on MARCH 12th 1972, I served the within PETITION FOR WRIT OF CERTIORARI (Marchese v. McEachen) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. 20543 (3 copies fwded)

ANGUS D. McEACHEN, Chief U. S. Probation Officer
UNITED STATES PROBATION OFFICE
600 U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012 (2 copies fwded)

UNITED STATES ATTORNEY
CENTRAL DISTRICT OF CALIFORNIA
12TH FLOOR, U. S. COURTHOUSE
Los ANGELES, CALIFORNIA 90012 (2 copies fwded)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH 12th 1972, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

SUPREME COURT, U.S.
FILED
MAY 2 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1187

MICHELE MARCHESE, PETITIONER

v.

ANGUS D. MCEACHEN, CHIEF UNITED STATES PROBATION OFFICER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1187

MICHELE MARCHESE, PETITIONER

v.

ANGUS D. MCEACHEN, CHIEF UNITED STATES PROBATION OFFICER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner brought this action in the United States District Court for the Central District of California seeking a declaration that, after his release from prison in July 1969 he could not, as the government contended, be deemed on parole under 18 U.S.C. 4164 for the period of "good-time" deductions. He claimed that narcotic offenders, who could not obtain probation or parole, should not be subjected to the conditions of parole for the period of release on good-time, and that the three and a half year period during which he was out on bail pending the government's

464-720—72

appeal from a reduction of sentence[1] should be counted to reduce the amount of time he should spend on parole.

The district court dismissed the complaint and the court of appeals affirmed in an opinion on which we rely (Pet. App. A).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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[1] The reduction in sentence was subsequently held to be invalid. 341 F. 2d 782, certiorari denied, 382 U.S. 817; 378 F. 2d 16, certiorari denied, 389 U.S. 930.